IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D12-1885

STATE OF FLORIDA,

Petitioner,

v.

STEPHEN M. COVINGTON,

Respondent.

_______________________________/

Opinion filed December 10, 2012.

Certiorari - Original Jurisdiction.

Pamela Jo Bondi, Attorney General, Carolyn M. Snurkowski, Associate Deputy Attorney General, and Charlie R. McCoy, Senior Assistant Attorney General, Tallahassee, for Petitioner.

Major B. Harding and Erik M. Figlio of Ausley & McMullen, Tallahassee, for Respondent.

Honorable Ronald Ficarrotta, Chair, Conference of Circuit Judges of Florida, Inc., Tampa, for Amicus Curiae.

VAN NORTWICK, J.

The State Attorney for the Second Judicial Circuit seeks a petition for a writ of certiorari or, in the alternative, a writ of prohibition. By his petition, the State

Attorney, Willie Meggs, seeks to overturn an order entered by the Honorable Charles W. Dodson in the above-styled cause. The order at issue requires the Office of the State Attorney to prepare proposed jury instructions and to submit them to the trial court on the day prior to the commencement of trial in cases pending before Judge Dodson. Because, in entering this order, the trial court did not depart from the essential requirements of the law and did not exceed its jurisdiction, we deny relief.

Certiorari is an extraordinary remedy that is available only in a limited class of cases. State v. Smith, 951 So. 2d 954, 956 (Fla. 1st DCA 2007). Further, a writ of certiorari is to be granted only if a trial court commits an error so serious that it amounts to a miscarriage of justice. Id. at 957; and see State v. Pettis, 520 So. 2d 250 (Fla. 1988). A writ of prohibition is to be granted only when it has been shown that a lower court is without jurisdiction or is attempting to act in excess of jurisdiction. English v. McCrary, 348 So. 2d 293, 296 (Fla. 1977); Mandico v. Taos Constr., Inc., 605 So. 2d 850, 854 (Fla. 1992).

Petitioner argues that the trial court's order is a departure from the essential requirements of law and is an act in excess of the trial court's jurisdiction. We disagree. As a general matter, a trial court has considerable discretion to resolve issues relating to the course and conduct of a criminal trial. See Owen v. State, 773 So. 2d 510 (Fla. 2000); Green v. State, 951 So. 2d 962 (Fla. 1st DCA 2007).

Thus, appellate courts traditionally do not interfere with a trial court's management of its own courtroom. See Ferrer v. State, 718 So. 2d 822, 825 (Fla. 4th DCA 1998). By entering the order at issue, the trial court certainly did not depart from the essential requirements of law as a circuit court plainly has the power to create standing procedural orders directing the conduct of litigation in his or her own courtroom. Owen; Green; and see generally McGlocklin v. State, 907 So. 2d 1288 (Fla. 3d DCA 2005); Tanner v. State, 724 So. 2d 156 (Fla. 1st DCA 1998); Black v. State, 630 So. 2d 609 (Fla. 1st DCA 1993).

Petitioner also argues that Judge Dodson's order is contrary to the Florida Rules of Criminal Procedure, particularly rule 3.390. We cannot agree. The rules of criminal procedure do not preclude the order at issue here. Rule 3.390 requires a judge to orally and in writing instruct the jury on the law of the case at specified times throughout the trial. While the rule requires the jury to be instructed by the trial court, this rule certainly does not preclude the trial court's consideration of proposed instructions prepared by one of the litigants.

Petitioner argues further that the trial court's order is an administrative order, rather than a court rule, under the Florida Rules of Judicial Administration. He reasons that, while a trial court has the authority to enter a court rule, only the chief judge of a circuit may enter an administrative order for the circuit. Again, we cannot agree. The term "court rule" is defined in rule 2.120 as a "rule of practice

of procedure adopted to facilitate the uniform conduct of litigation applicable to all proceedings, all parties, and all attorneys." The order at issue plainly sets a practice of procedure for the uniform conduct of criminal litigation in Judge Dodson's courtroom. As this order is a matter within the broad discretion accorded to a trial court over courtroom management, it is not violative of the rules of judicial administration and is consistent with a trial court's broad discretion regarding courtroom management.

Petitioner relies heavily on State, Department of Juvenile Justice v. Soud, 685 So. 2d 1376 (Fla. 1st DCA 1997). Soud is plainly inapposite. The challenged order in Soud purported to apply to the conduct of all proceedings in the Juvenile Division of the Fourth Judicial Circuit and required the Department of Juvenile Justice, an executive branch agency, to prepare risk assessment instruments in accordance with factors that were inconsistent with the factors outlined in the applicable Florida statute. Judge Soud's order, unlike Judge Dodson's order here, was intended to have application outside of his individual courtroom. Furthermore, the order at issue in Soud attempted to legislate and violated the separation of powers because it sought to compel an executive branch agency to take actions in derogation of statutes enacted by the legislature. Id. at 1378-80. Judge Dodson's order prescribes procedure solely with respect to a core judicial function and does not implicate the separation of powers doctrine.

Because the order of the trial court does not depart from the essential requirements of law and does not exceed the authority of the trial court, the petition for extraordinary relief is DENIED.

WETHERELL, J., CONCURS and MAKAR, J., SPECIALLY CONCURS WITH WRITTEN OPINION.

MAKAR, J., specially concurring.

The extraordinary relief sought is not warranted in light of the trial judge's clarification at the hearing that he does not intend to enforce his jury instructions order in every case set for trial. Instead, he limits application of the order to only those cases where a jury has been selected. This limitation should alleviate what would otherwise be a significant hardship on the State to prepare instructions in the vast majority of cases set for trial that ultimately are resolved without a trial. The trial judge's order, however, does not contain this verbally announced limitation; it should be amended to make this limitation more widely known so that practitioners understand its applicability.

Because state attorneys are executive branch officials, wielding the prosecutorial authority of the State of Florida, legitimate concerns regarding separation of powers with judicial branch orders can arise. See, e.g., Office of the State Att'y for Eleventh Jud. Cir. v. Polites, 904 So. 2d 527, 532 (Fla. 3d DCA 2005) (finding order directing state attorneys and public defenders to pay for mental health exams for litigants they did not authorize to violate separation of powers). But state attorneys are also officers of the court who, under the inherent powers of the judicial branch, can be called upon "to prepare a document for the court's use in connection with a specific case in which the lawyer represents one of the litigating parties." United States v. Ray, 375 F.3d 980, 988 (9th Cir. 2004); see

Polites, 904 So. 2d at 532 ("Although the Office of the State Attorney is found in article V of the Florida Constitution, the judicial branch of the State, 'the decision to prosecute is an 'executive' function. A state attorney, while being a quasi-judicial officer, also shares some attributes of the executive.' " (quoting Office of the State Att'y, Fourth Jud. Cir. v. Parrotino, 628 So. 2d 1097, 1099 n.2 (Fla. 1993))).

In upholding an administrative order requiring a United States Attorney to assemble information in each case for submission to a sentencing commission, the Ninth Circuit in Ray rejected separation of powers concerns, stating that the "Constitution affords courts ample space to demand the assistance of an officer of the court in the context of litigation—even when that officer is also an officer of the executive branch." Ray, 375 F.3d at 988. In contrast, the imposition of a duty "that is *unrelated* to the central mission of the judicial branch" would lead to separation of powers problems. Id. Here, the challenged jury instructions order—as clarified—falls readily within the parameters of acceptable judicial practices.

The court in Ray noted that, as a factual matter, compliance with the challenged order would not impair the ability of an executive branch official to fulfill his constitutional obligations; it also found that the "administrative burdens of complying" with the order "appear to be minimal." Id. at 996, 997 (noting that compilation of sentencing reports in the 600 cases at issue "consumed the

equivalent of one-third of the time of one full-time employee in that District's probation department"). In contrast, a judicial order that imposes undue administrative burdens could be viewed as an abuse of judicial discretion and thereby render the order invalid. Id. at 997-98.

As a judicial policy matter, it is a legitimate concern of state attorneys that an across-the-board requirement that they file jury instructions in every case set for trial would have a serious impact on their office management practices and unfairly shift the economic burden to them for this aspect of judicial administration. State attorneys (and public defenders) operate on limited budgets and have hectic schedules; a compulsory practice that applies to all cases set for trial, not just those actually going to trial, puts unnecessary and potentially wasteful pressure on these budgets and schedules. The extra time and resources expended for such a practice also necessarily displace important activities that would otherwise be performed. If an administrative order is unduly burdensome because it disrupts the operations of a state attorney's functions in a substantial way, an abuse of discretion may be found. Here, the trial judge's refinement of his jury instructions order is an important one that should reduce the State's concerns, thereby making the relief sought unnecessary.